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THE TIMOR GAP TREATY BETWEEN
AUSTRALIA AND INDONESIA

Paper presented by Ms. Sasha Stepan of Monash University, Australia at the Second Conference on East Timor, held at Porto University, Portugal, April 28 - May 1, 1990.

Introduction

The Timor Gap Zone of Cooperation Treaty between Australia and Indonesia was signed in a mid-air ceremony during a flight over the Timor Gap in December 11, 1989 by the respective Australian and Indonesian Foreign Ministers, Senator Gareth Evans and Mr. Ali Alatas. It has been hailed by both countries as a creative and peaceful alternative to a protracted delimitation dispute, "...establishing a long-term stable environment for petroleum exploration and exploitation..." which "...would not prejudice the claims of either country to sovereign rights over the continental shelf..." and would not "...preclude continuing efforts to reach final agreement on permanent seabed boundary delimitation". It has also been claimed to have successfully remove a "potential source of bilateral and regional friction". Yet this latter statement may well be misguided, for amidst the self congratulatory statements echoing around Jakarta and Canberra, one fundamental aspect is being conveniently ignored: the plundering of the rights of the East Timor people. The only hope for the East Timorese in respect of this matter is for Portugal to take decisive action on their behalf as the U.N. recognized administering authority.

This paper will briefly first present the background history to the evolution of the Treaty, secondly present a summary of the Treaty's main features and in conclusion discuss Australia's rejection of Portuguese criticism that the treaty violates international law.

A. History of Timor Gap Negotiations

The region known as the Timor Gap arose as a result of international boundary agreements struck between Australia and Indonesia in 1971-2 that left a gap in the boundary opposite what was then Portuguese Timor. In 1974-5 discussion between Australian and Portuguese authorities concerning a closing of the boundary gap took place, but these talks stalled and were still unresolved in December 1975 at the time of the Indonesian invasion of the colony.

In February 1979 Australia and Indonesia commenced negotiations over the Timor Gap and it was this move, according to current Prime Minister R.J. Hawke, that signalled the granting of de jure recognition to Indonesian sovereignty over East Timor. It would appear that desire to solve the Timor Gap issue and gain access to the potentially high oil reserves in the area was a major factor in Australia's decision to recognise the

annexation. It was feared that if Canberra opposed Indonesia's incorporation of East Timor at the U.N., Indonesia could retaliate by freezing the boundary talks. In August 1975, the Australian Ambassador to Indonesia Mr. Dick Woolcott sent a cable to the Australian Department of Foreign Affairs in which he stated:

"We are all aware of the Australian defence interest in the Portuguese Timor situation, but I wonder whether the Department has ascertained the interest of the Minister of the Department of Minerals and Energy in the Timor situation... closing the present gap... could be much more readily negotiated with Indonesia than with Portugal or independent Portuguese Timor".

Although nine rounds of negotiations have occurred since 1979, Australia and Indonesia have been unable to agree with regard to permanent delimitation of the seabed because each country takes differing views as to the principles of international law which govern this area. Australia argues that under international law Australia's and Indonesia's seabed rights extend from their coastline throughout the natural prolongation of their continental shelves which end in the deepest part of the Timor Trough. Indonesia's position has been that there is one shared continental shelf between Australia and Indonesia and that accordingly a boundary equidistant between the two coast lines (the median line) would be appropriate. Indonesia also argues that the new Exclusive Economic Zone concept with seabed rights out to 200 nautical miles, supports the median as the appropriate principle.

Due to the difficulty of reconciling the two countries' competing claims, both countries began exploring the possibility of a provisional "joint development zone" to operate pending final delimitation. Detailed discussions on this proposal were held in mid 1985 when Senator Evans visited Indonesia as the then Minister for Resources and Energy. In October 1988, on his first visit to Indonesia as Minister for Foreign Affairs and Trade, he and Indonesian Foreign Minister Ali Alatas announced an interim agreement on the Zone of Cooperation Proposal. On December 11, 1989 the Treaty was formally signed.

B. The Treaty

1. Zones of Cooperation

Part I of the Treaty establishes the Zone of Cooperation in an area between the Indonesian Province of East Timor and Northern Australia, which comprises Areas A, B and C, a total of approximately 61,000 square kilometres.

Area A is to be jointly controlled by both states with equal sharing of the benefits of exploitation. Area A contains the highly prized but geologically unknown "kelp" structure,

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which has been estimated to hold potentially several billion barrels of oil.

Area B is to be administered by Australia, with 10% of gross Resource Rent Tax given to Indonesia.

Area C is to be administered by Indonesia, with 10% of Contractor's Income Tax given to Australia.

The Northern extent of the Zone of Cooperation is delineated by the maximum Australian continental shelf claim. The southern extent of the zone is delineated by the 200 nautical mile line measured from the Indonesian baselines (i.e. the maximum Indonesian EEZ claim). The eastern and western sides are delineated by "equidistance lines".

The Treaty does not purport to finalise the seabed boundary, under Article 2 Clause 3 of the Treaty each party reserves its respective sovereign rights claimed in the Timor Gap.

2. Administrative Arrangements

The Treaty establishes as responsible authorities for the Area a Ministerial Council and Joint Authority. Overall responsibility for the Area vests in the Ministerial Council, in all matters relating to exploration for and exploitation of petroleum resources. The Council is to consist of an equal number of Australian and Indonesian Ministers and its decisions are to be arrived at by consensus. Specifically the functions of the Ministerial Council (detailed in Article 6(1) (a)-(s)) include any amendment to the Petroleum Mining Code; modification of the Model Production Sharing Contract; approval, variation and termination of production sharing contracts and the distribution of revenues there from.

The Joint Authority is to be the operative administrator of Area A. It is established by the Treaty as a separate judicial entity with legal capacity under the laws of Indonesia and Australia. Its functions, to be carried out in accordance with the Petroleum Mining Code, include dividing Area A into contract areas, entering into production sharing contracts, distributing of proceeds, marketing of petroleum (with Council approval), issuing of regulations, and responsibility for environmental protection, safety, search and rescue, and any action required "in the event of terrorist threat to vessels and structures engaged in petroleum operations in Area A".

3. Mining Regime

Petroleum exploration and exploitation in the Area is to be conducted pursuant to production sharing contracts between the Joint Authority and petroleum contracting corporations. These contracts are to be based upon the model PSC (Annex C of Treaty)

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and each contract must obtain Ministerial Council approval. Where a number of corporations in joint venture enter into a contract, they must appoint one of their number as the Operator of the contract.

The Joint Authority will divide Area A into blocks for which it will invite applications to enter into contracts using a work program bidding system. Several companies have prior interest to claims in the Gap that were granted prior to 1970: Woodside Petroleum, EIS Aquitaine and Petroz - NL Western Mining. The status of these prior permits under the new system is no doubt an issue of major concern to the oil companies, who may well mount legal challenges if they are overrun by new applicants.

4. Petroleum Ownership

The Treaty provides that the contractor will not acquire ownership of petroleum in the ground, but rather, will take a share of the petroleum produced, both as payment for operations undertaken and as a share of the proceeds. Ownership remains with the Joint Authority. The contractor acquires ownership in its portion of produced petroleum only at the point of tanker loading.

5. Applicable Laws

(i) Taxation - The Taxation laws of both States are to apply in Area A, but the Treaty provides relief against double taxation.

(ii) Customs - both states are to apply their customs law to goods entering their territory from, or leaving their territory for, Area A. Unless otherwise authorised by the States, persons, goods and equipment are not to enter Area A unless they have first entered one of the States.

In respect of other legal matters, companies and individuals operating in Area A are subject to the laws of their country of origin.

With respect to criminal actions, nationals of third states not party to the Treaty will be subject to the criminal law of both states (subject to a res judicata rule).

6. Settlement of Disputes

Disputes arising between the Contracting States with regard to the interpretation or application of the Treaty are to be resolved by consultation or negotiation. Each production sharing contract shall also specify a form of binding commercial arbitration with regard to disputes as to the interpretation or application of the contract.

7. Implementation of the Treaty

Both Australia and Indonesia intend to finalize implementation as quickly as possible, in order to allow petroleum operations to begin as soon as practicable. The first task of implementation is the completion of necessary national requirements to bring the Treaty into force early in the second half of 1990.

For Australia, this involves the amendment of legislation so that arrangements provided for in the Treaty can be carried out in accordance with Australian law. Amendments to Australian legislation will be put before Parliament. Successful completion of similar processes on the Indonesian side would mean that the Ministerial Council and Joint Authority could be established. These two bodies would be operational when the Treaty came into force.

Much of the early work of the Joint Authority would involve dividing Area A into contract areas, with the aim of releasing exploration acreage in the area towards the end of 1990. This would foresee commencement of petroleum exploration activity in Area A early in 1991.

The Treaty will remain in force for 40 years, with successive 20 year term extensions, unless there is agreement between Australia and Indonesia on permanent continental shelf delimitations. If such an agreement is concluded, the Treaty ceases to be in force.

C. Australia's Response to Portuguese Criticism of the Timor Gap Treaty

The signing of the Timor Gap Treaty can be held to be a violation of international law in respect of the denial of the East Timorese peoples right to self determination and their sovereign right to their resources. In signing the Treaty and preparing to divide up the spoils of the Gap between themselves, Australia and Indonesia are conveniently ignoring the fact that Indonesia's military annexation of East Timor, which gives it sovereignty to negotiate the treaty, was illegal and that the continuing occupation of East Timor is illegal. Thus any treaty depending on Indonesia's illegal sovereignty can thus be argued to be void at international law, violating the right of the East Timorese to self-determination, a peremptory norm in international law.

Yet Australia rejects claims that its actions are inconsistent with established international law and Senator Gareth Evans has stated publicly that should Portugal seek to initiate any action in any forum, Australia would defend its position "with vigour and determination".

Australia's rejection of Portuguese criticism is as follows:

- Firstly, Australia maintains that there is no binding legal obligation not to recognize the acquisition of territory acquired by force.
- Secondly, conclusion of the Timor Gap Treaty does not signify Australia's approval

of Indonesia's original acquisition of the territory of East Timor.

- Thirdly, Australia claims that in international law, the legality of the original acquisition of territory has to be distinguished in subsequent dealings between the state acquiring that new territory and other states.
- Fourthly, Australia has never conceded prior to 1975, any Portuguese interest in the area of the seabed forming part of the Zone of Cooperation. Consequently, Australia does not accept the assertion that the East Timorese have any permanent sovereign rights over seabed resources in the Gap.
- Finally, Australia maintains (with an interesting twist of logic) that the "East Timor issue" is a matter quite separate from the Timor Gap Treaty, which concerns maritime boundaries between neighbours. Australia asserts that its conclusion of the Treaty in no way impedes its efforts in continuing to support discussions between Portugal and Indonesia at the U.N. to resolve the East Timor issue.

All of these points are clearly debatable and would no doubt be subject to vigorous scrutiny at the International Court of Justice. The Australian Government's view *reflects* an interpretation of international law that acts of aggression can be ignored and that violators of international law can obtain good title to territory which they seize. It condones violations of the U.N. Charter and many U.N. resolutions dealing with both political and economic self-determination. In short, it is a view unlikely to gain approval from the International Court of Justice.



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"Australia and Indonesia sign the Timor Gap Treaty - in a plane above the Timor Gap"

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WORK DONE ON THE "TIMOR GAP" ISSUE:

- Thesis, forthcoming publication by ACFOA and Pluto Press, with Introduction by Jose Ramos Horta.
- "Self-Interest Leads Australia to Credibility Gap", World News Comment. The Age, 31 December 1989.
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